Federal Court  Cour fédérale

Date: 20180205

Docket: T-364-14

Citation: 2018 FC 127

Ottawa, Ontario, February 5, 2018

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

SADDLE LAKE CREE NATION CHIEF AND COUNCIL, on their own behalf and on the behalf of all the members of SADDLE LAKE CREE NATION

Plaintiff

and

THE ATTORNEY GENERAL OF CANADA

Defendant

and

CANADIAN HUMAN RIGHTS COMMISSION

Intervener

JUDGMENT AND REASONS

I. Introduction

[1] This is a motion for summary judgment in an action in which the Saddle Lake Cree Nation Chief and Council, on their own behalf and on the behalf of all members of the Saddle Lake Cree Nation [SLCN] seek a declaration that the 2010 custom election for Chief and Council is not a "service" within the meaning of s 5 of the *Canadian Human Rights Act*, RSC 1985, c H-6 [Act].

5 It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public	**5** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public :
(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or	**a)** d'en priver un individu;
(b) to differentiate adversely in relation to any individual,	**b)** de le défavoriser à l'occasion de leur fourniture.
on a prohibited ground of discrimination.	

[2] The motion arises from an action by the SLCN to challenge the Canadian Human Rights Commission's [Commission] decision to refer a complaint of discrimination filed by Vivian Wirth [Wirth] [the Wirth Complaint] to the Canadian Human Rights Tribunal [Tribunal] regarding her disqualification from running in the Chief and Council election of 2010.

[3] The history of this litigation is unusual. The complainant Wirth chose not to be involved and both the SLCN and the Defendant Attorney General of Canada [Attorney General] agreed that the Commission had no jurisdiction over the 2010 election, but for very different reasons. As a consequence, the Commission was added as an intervenor and ultimately played the role of defendant on this motion because a) the Attorney General expressed no interest in the issue; b) Wirth did not involve herself in the litigation; and c) both the SLCN and the Commission wanted a determination before engaging in the time and expense of a full Tribunal hearing.

[4] This Court, in keeping with the modern and efficient resolution of litigation laid down in *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 [*Hryniak*], determined that this was an appropriate matter for a summary judgment motion.

II. Background

A. *Facts – Election Removal*

[5] The facts on this motion are not really in dispute. Both the SLCN and the Commission argued that the Court had all the facts necessary to resolve the motion, although the Commission requested that the motion be stayed.

[6] The Saddle Lake Band, which includes the SLCN and the Whitefish Lake First Nation, is an Indian Band defined under the *Indian Act*, RSC 1985, c I-5, which holds its elections pursuant to custom and not under the *Indian Act* election process. The Chief and Council elected by the

SLCN and the Chief and Council elected by the Whitefish Lake First Nation sit together collectively as the Saddle Lake Band Council.

[7] Elections for Chief and Council of the SLCN occur every three years. The sitting Chief and Council appoint electoral officers whose duties include scrutinizing all nominees and determining their eligibility to run for office. This includes the screening, investigation, and removal of those persons who do not meet the SLCN eligibility requirements. Enforcement of election custom eligibility requirements ensures that only those eligible to run do so.

[8] Eligibility challenges are initiated by written protests received by an established deadline. The electoral officers investigate protest letters, and after a nominee has had an opportunity to respond to the protest, the electoral officers decide if the nominee is eligible to run. Such a decision is not subject to internal appeal.

[9] In May 2010, Wirth was nominated in the election. Shortly thereafter the electoral officers received a written protest to her nomination.

The electoral officers decided to remove her name from the list of nominees.

[10] Wirth filed a complaint with the Commission in which she alleged that she was removed because she was married to a Caucasian man.

[11] It was the position of the electoral officers and attested to be uncontradicted affidavit evidence in this case that Wirth's name was removed from the list of nominees because she was

not a “person of good character”, which is a condition for eligibility. The SLCN says that the removal decision was independent of gender, marital status, or the race of Wirth’s spouse. There is a strong suggestion in the evidence that the protest centred around alleged drug use.

[12] Wirth ran in the next two elections, in 2013 and 2016, without any protests filed against her. She was not elected in either election.

[13] Wirth has subsequently left the reserve, moved to Vancouver, and taken no active part in these proceedings although she has expressed a continuing interest in the matter.

B. *Facts – Commission Decision*

[14] The Commission decided to investigate the Wirth Complaint. In its Investigation Report of November 7, 2012, the investigator [Investigator] referred to two of the issues in this litigation. The first is whether the conduct complained of, the removal of Wirth’s nomination, is a “service”.

[15] The second issue is whether the election was conducted under tribal custom law and whether s 67 of the Act as in force at the time would apply such that the Commission did not have jurisdiction over this matter. It is on this point that the Attorney General concurs with the SLCN’s position that the Commission does not have jurisdiction, although the SLCN’s reasons differ. The Attorney General takes no position on the issue of a “service”.

[16] On the issue of a "service", the Investigator, relying on *Watkin v Canada (Attorney General)*, 2008 FCA 170, 167 ACWS (3d) 135 [*Watkin*], and referring to *Canada (Canadian Human Rights Commission) v Pankiw*, 2010 FC 555, 369 FTR 84, determined that the holding of an election is a benefit to the members of the SLCN and is therefore a service available to the public. The Investigator recommended an inquiry by the Tribunal.

[17] The Commission accepted the recommendation and so advised the SLCN on February 14, 2013. The reasons of the Commission for referring the matter to an inquiry are the reasons of the Investigator unless otherwise stated.

[18] On March 22, 2013, the SLCN initiated a judicial review (T-504-13) in which, *inter alia*, it challenged the Commission's jurisdiction on the basis that the election, in particular enforcement by custom eligibility, was not a "service". The SLCN also claimed that the Commission exceeded jurisdiction because it failed to consider that Wirth had alternative remedies, as it was required to do under s 41(1)(a) and (b) and s 44 (2)(a) and (b) of the Act. The SLCN also claimed infringement of its rights under s 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act*].

[19] Subsequently, by order of a prothonotary, the Attorney General was removed as Respondent, leaving Wirth as the sole Respondent.

[20] As a result of the filing of a Notice of Constitutional Question, and Wirth indicating that she would not be participating in the litigation, the Court restored the Attorney General as Respondent so that there was a responding party on the judicial review.

[21] Because of the complexities of proof which could flow from this litigation in respect of s 35 aboriginal rights, the SLCN's judicial review was to be converted into an action and the judicial review put in abeyance.

The SLCN commenced an action (T-364-14) which paralleled the judicial review.

[22] In the Statement of Claim, the SLCN alleges that the Commission does not have jurisdiction over custom elections, and that the Act does not apply for the following reasons:

- The SLCN's election custom is outside the scope of the Act, which is limited by s 2 to laws "within the purview of matters coming within the legislative authority of Parliament," because the SLCN's custom election is not authorized by Parliament.
- In the alternative, Wirth's exclusive remedy was to apply for judicial review. Since the decision of the election officer to remove Wirth from the ballot was a decision of a federal tribunal, her only legal recourse was through an application for judicial review pursuant to s 18 of the *Federal Courts Act*, RSC 1985, c F-7.
- In the further alternative, the SLCN's custom is not a "service" as that term is used in s 5 of the Act. Instead, it is a service to the SLCN and its membership, and by participating in the process Wirth was providing a service rather than the other way around.

The SLCN also alleges that the removal of Wirth was pursuant to election custom, both with respect to the screening of nominees, and the requirement that nominees be of good character. The election custom is integral and essential to the SLCN's culture, traditions, and institutions, and part of the inherent right of self-government and self-determination recognized and affirmed by s 35 of the *Constitution Act*. The SLCN submits that the Act is inconsistent with the SLCN's exercise of their right to choose leaders according to their election custom and, since s 52(1) of the *Constitution Act* provides that any law inconsistent with the Constitution is of no force or effect, the Act is therefore inapplicable to the election custom.

[23] In the Statement of Defence in this action, the Attorney General took the position that the *Indian Act* did apply to the Chief and Council election process. Since the Saddle Lake Band Council receives its authority and powers under the *Indian Act* through meeting the definition of "council of the band" in s 2(1), it is therefore subject to the *Indian Act*. Additionally, s 74(1) empowers the Minister to revoke the authority for the custom election process, also serving to make the Saddle Lake Band Council subject to the *Indian Act*. This means that s 67 of the Act operates to make the Act inapplicable to both the election custom and the Wirth Complaint, as it was within the grace period prior to its repeal.

[24] In the alternative:

- if the Act does apply, then the Attorney General denies that its application constitutes infringement of any aboriginal right; and
- if it is found that the application of the Act does infringe the aboriginal right, then the Attorney General states that such infringement is justified.

[25] The Commission's first attempt to be added as an intervenor in the action was not successful, and its appeal was denied. After the Attorney General took no position on the matter of "service", an issue the Commission had a substantial interest in, the Court permitted the Commission to appear as the respondent on the motion for summary judgment on this issue.

[26] The Tribunal inquiry is ongoing in theory but not in practice. The Court has been advised that the matter is stayed pending the Court's decision on this motion.

III. Issues

[27] The issues in this motion are:

a) whether the motion for summary judgment should proceed; and

b) whether the enforcement of the SLCN election custom is a "service" over which the Commission has jurisdiction.

IV. Analysis

A. *Re: Summary Judgment Motion*

[28] The Commission sought a stay of this summary judgment motion to allow the Commission to proceed with all the issues, including s 67 of the Act and s 35 of the *Constitution Act*.

[29] With respect, I see insufficient reason to exercise my discretion to stay this motion. It is noteworthy that until the Tribunal ordered a stay, the SLCN's Federal Court litigation posed no impediment to the Tribunal proceeding with their inquiry.

[30] As the Commission recognized in its notice to the SLCN of the decision to refer the matter to the Tribunal, the SLCN was entitled to challenge the referral decision in Federal Court. To grant a stay of this motion would be to interfere with the review of the Commission's decision to refer the matter to an inquiry.

There is a secondary issue of whether a summary judgment motion is appropriate which is discussed later.

[31] In the normal course, a party may challenge a referral decision pursuant to s 18 of the *Federal Courts Act,* and the judicial review and the Tribunal proceeding would continue on separate tracks.

If this case were not so complicated, a judicial review of the referral decision would likely have been disposed of before the Tribunal process was concluded.

[32] The conversion of this judicial review to an action does not lessen the fact that it is a review of the Commission's decision which the SLCN is entitled to bring.

[33] The granting of a stay is not only discretionary but is to be exercised sparingly and in the clearest of cases.

The Respondent has not shown that there is a clear case to stay these proceedings in favour of the Tribunal process.

[34] The fact that there would be some overlap of issues between the Tribunal and the judicial review is inherent in any challenge of a referral decision authorized under the *Federal Courts Act*. There is no provision suggesting that a stay of proceedings of a judicial review should apply so as to allow the Tribunal to complete its inquiry. Indeed, the opposite is suggested by the right to judicial review of the Commission's decision to initiate an inquiry.

[35] There is prejudice to the SLCN in staying this motion. Having converted the judicial review to the form of an action, the SLCN gains the obligations and rights of an action. It is required to plead as an action, required to produce documents, and required to be subject to discovery. It also enjoys the right to other procedural protections of an action including the right to bring a motion for summary judgment.

There is, in reality, no corresponding prejudice to Wirth as her Tribunal process can and would continue if the Tribunal had not issued its own stay.

[36] As a further consideration, this is a most unusual case, as detailed earlier. As such, the Court must be flexible in its weighing of the factors engaged in its exercise of discretion. This is consistent with Justice Gascon's comments in *1395804 Ontario Ltd (Blacklock's Reporter) v Canada (Attorney General)*, 2016 FC 719 at paras 38 and 41, 271 ACWS (3d) 704, which confirmed that the usual factors to be considered on a stay motion are not exhaustive and the factors need to be adapted to the unique context in this case.

[37] The Court is very cognizant of the fact that this litigation is judicial review, which remains a judicial review despite being conducted as an action. As such, motions to strike a judicial review are only available in exceptional circumstances. If this matter had not been converted, the SLCN would have no equivalent opportunity to use summary judgment-type procedures.

[38] However, Rule 213 of the *Federal Court Rules*, SOR/98-106, allows a party to bring a motion for summary judgment on "all or some of the issues raised in the pleadings". Where there is a discrete issue amenable to decision without further evidence and which could be dispositive of the action, the *Hryniak* decision teaches that courts should favour proceedings that resolve matters without further delay and expense.

[39] In the present case, there is a discrete issue of "service" under s 5 of the Act which the SLCN and the Commission agree is amenable to decision without further evidence. This issue can be determined without reference to the other issues in the Statement of Claim and, if resolved in favour of the SLCN, would be dispositive.

[40] Therefore, the Commission's request to stay this motion is dismissed. The Court will deal with the motion for summary judgment.

B. *Standard of Review*

[41] Neither party addressed this issue. Both parties appear to have viewed the issue of whether the enforcement of the SLCN election custom is a "service" as if it was a true jurisdictional question.

[42] Although the judicial review was converted to an action and the parties are subject to the procedural rules of an action, the matter remains a judicial review. As such, the Court is required to examine the issue in accordance with the proper standard of review.

[43] In light of the teachings of *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 [*Alberta Teachers*], and *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland Nurses*], true issues of jurisdiction are rare and thus a correctness standard is rare. The default standard is now accepted as "reasonableness", even on questions of law. This is particularly so where the administrative body is interpreting its "home statute", as the Commission was in this case.

[44] While the question of "service" in the context of election law may be an issue of central importance to the legal system in Canada, it is a question of mixed fact and law and best resolved by a body with recognized expertise in the field of human rights.

[45] The courts have accorded human rights bodies considerable deference in dealing with complaints and the interpretation and application of their governing statute.

[46] Therefore, I have concluded that the standard of review is reasonableness.

[47] A "reasonableness" analysis takes into account justification, transparency, and intelligibility within the decision-making process. As held in *Dunsmuir v New Brunswick,* 2008 SCC 9, [2008] 1 SCR 190, the outcomes must fall within a range of acceptable outcomes.

[48] It was the SLCN's position that the Commission erred in its interpretation of "service" because it misunderstood or misapplied the teachings of the Federal Court of Appeal in *Watkin*.

[49] Absent some explanation, a decision by an administrative body which does not accord with precedent or with the teachings of the supervisory courts cannot be said to fall within the range of reasonable outcomes. As a matter of the rule of law and precedent, the Commission must follow the guidance of the Federal Court of Appeal, the Federal Court, and the Supreme Court of Canada.

[50] If the SLCN can make out this argument, then the Commission's conclusion that the enforcement of the SLCN's election custom against Wirth is a "service" was not reasonable and the decision must fail on this point.

C. *"Service"*

[51] The discriminatory action at issue was the SLCN election officers' removal of Wirth from the nominee list for non-compliance with the SLCN election custom. The SLCN contends that removal was due to Wirth not being of "good character". Wirth alleges that the real reason that she was removed was that she is married to a Caucasian man.

[52] The Commission found that the whole election process was a "service" available to the public. The Commission did not consider whether the specific offending action – the enforcement of election custom – was the "service" in question.

[53] The Commission's position, as evident from the Investigator's report and as argued on this motion, is that one must approach "service" from a holistic view, taking into account the whole process of the election without breaking it down to determine what specific function is at issue.

[54] With great respect to the Commission, that reasoning is contrary to the teaching of the Federal Court of Appeal in *Watkin. Watkin* is dispositive of this matter.

[55] In *Watkin,* the company Biomedica Laboratories Inc. [Biomedica] was engaged in the sale of products which were subject to the *Food and Drugs Act,* RSC 1985, c F-27 and its approval process. Health Canada was concerned with certain of Biomedica's advertising. In the

absence of a "New Drug Submission", it eventually required Biomedica to recall and cease the sale of a particular product.

[56] Noël JA (as he then was) at para 22 concluded that enforcing the *Food and Drugs Act* by the manner complained of was not providing "'services, … customarily available to the general public' within the meaning of section 5".

The learned judge concluded that the actions in question were "coercive measures intended to ensure compliance." That these measures were undertaken in the public interest did not make them a service.

[57] The Court of Appeal did not examine the drug approval process in the "holistic" manner the Commission suggests. The Court of Appeal focused on the "offending" act – the recall and cessation of sale – to determine if that was a "service".

[58] In like manner, the elections officers were enforcing SLCN election custom for the purpose of compliance. *Watkin* teaches that enforcement of laws is not a "service" under s 5. The SLCN election custom is a law which this Court, along with other courts in similar circumstances, recognizes as binding on members of the SLCN and is to be respected and enforced.

[59] Without engaging in a s 35 analysis or detailed aboriginal rights analysis, the Courts should look to respect aboriginal internal laws where appropriate.

[60] The Court of Appeal also set out the analytical framework to be applied. As noted at para 31, the first step is to determine whether the actions complained of are "services". This required the Commission to look at the offending conduct – enforcement by removal – and not at the entire process, as the Commission did:

> [T]he first step to be performed in applying section 5 is to determine whether the actions complained of are "services" (see *Gould*, *supra*, per La Forest J., para. 60). In this respect, "services" within the meaning of section 5 contemplate something of benefit being "held out" as services and "offered" to the public (*Gould*, *supra*, per La Forest J., para 55). Enforcement actions are not "held out" or "offered" to the public in any sense and are not the result of a process which takes place "in the context of a public relationship" (*Idem*, per Iacobucci J., para. 16). I therefore conclude that the enforcement actions in issue in this case are not "services" within the meaning of section 5.

[61] The Court of Appeal also made clear that a "holistic" approach that would sweep all actions conducted under the elections custom into the definition of "services" must be rejected in favour of an examination of the specific offending action:

> [33] Regard must be had to the particular actions which are said to give rise to the alleged discrimination in order to determine if they are "services" (*Gould*, *supra*, per Iacobucci J., para. 16, per La Forest J., para. 60), and the fact that the actions are undertaken by a public body for the public good cannot transform what is ostensibly not a service into one. Unless they are "services", government actions do not come within the ambit of section 5. As in the present case, the enforcement actions which form the object of the complaint are not "services" under any of the meanings that can be given to this word, the Commission is without jurisdiction to hear the complaint.

[62] The Commission, while referring to *Watkin* case, did not follow its interpretation or application of s 5 of the Act. Given the close parallel between the principled facts of the *Watkin* decision and the case at bar – enforcement of laws – the Commission's decision is unreasonable.

[63] The Court of Appeal in *Watkin* found that the Commission was without jurisdiction. The *Watkin* decision did not address the standard of review and was decided prior to the Supreme Court of Canada's instruction on "reasonableness" and true issues of jurisdiction in *Alberta Teachers* and *Newfoundland Nurses*. However, the result remains the same, and the Commission's decision cannot be upheld.

[64] I would add that the Commission cited some of its own decisions and in particular the case in *Canada (Attorney General) v Davis*, 2013 FC 40, 425 FTR 200, which found that enforcement by the Canada Border Services Agency was a s 5 "service". Commission counsel, in the best traditions of an "officer of the Court", pointed out a critical factual difference in enforcement at the Cornwall Island port of entry not readily apparent from the decision itself, for which the Court is grateful. It was recognized that this decision may not be the most persuasive authority due to the unique factual circumstances involved.

[65] In any event, the reasoning of the Court of Appeal is more directly on point, precedential, and binding on this Court and the Commission.

[66] While this authority is sufficiently dispositive of the motion and of the Commission's decision, the SLCN also raised that the Commission failed to properly address the availability to Wirth of an alternative adequate remedy. Pursuant to ss 41 and 44 of the Act, as mentioned earlier, the Commission is required to consider alternatives before exercising its discretion to refer a matter for inquiry.

[67] In numerous cases in this Court, the Federal Court has accepted that it has supervisory authority over SLCN elections including elections under custom law: *Ratt v Matchewan*, 2010 FC 160, 362 FTR 285; *Okemow v Lucky Man Cree Nation*, 2017 FC 46, 275 ACWS (3d) 679; *Shirt v Saddle Lake Cree Nation*, 2017 FC 364, 279 ACWS (3d) 2.

[68] In this case, the Commission failed to consider that Wirth had judicial review available to her of the decision to remove her as a candidate. This was a failure to consider a relevant matter. This further undermines the Commission's decision.

V. Conclusion

[69] For these reasons, the Plaintiff's motion for summary judgment is granted. The Commission's determination of a "service" cannot stand.

[70] The Commission is enjoined from proceeding further with its inquiry.

[71] The Plaintiff shall have its costs of this motion paid by the Commission.

JUDGMENT in T-364-14

THIS COURT'S JUDGMENT is that the Plaintiff's motion for summary judgment is granted. The Canadian Human Rights Commission is enjoined from proceeding further with its inquiry. The Plaintiff is to have its costs of this motion paid by the Canadian Human Rights Commission.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-364-14
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PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	OCTOBER 3-4, 2017
JUDGMENT AND REASONS:	PHELAN J.
DATED:	FEBRUARY 5, 2018

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